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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-5831

JAMES H. McCONNELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

INTRODUCTORY STATEMENT

The Petitioner, James H. McConnell, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, unofficially reported as *United States v. McConnell*, — F.2d — (5th Cir., 1974), handed down by the United States Court of Appeals for the Fifth Circuit on October 15, 1974.

The Opinion of the United States Court of Appeals for the Fifth Circuit is appended, bound with this Petition, and marked Appendix "A".

Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit on October 15, 1974, and the Order denying the Petition for Rehearing is appended, bound with this Petition, and marked Appendix "B".

By Order of the United States District Court, Southern District of Texas, Laredo Division, on November 1, 1974, Petitioner was directed to the custody of the United States Marshal for execution of sentence, and at the present time Petitioner is in the custody of the United States Marshal and/or appropriate custodial authorities of the United States Government. The Order of Commitment is appended, bound with this Petition, and marked Appendix "C".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit and Order of said Court denying the Petition for Rehearing dated October 15, 1974.

Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1254.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not Petitioner's Fourth Amendment rights under the United States Constitution were abrogated through a warrantless search of an automobile which Petitioner had leased and which was, at the time of said illegal search, in possession of another party.

(2) Whether or not Petitioner has standing to object to a previously adjudicated illegal search and seizure, and by virtue thereof the correctness *vel non* of the lower Court's admission of evidence against Petitioner garnered through an illegal search and seizure.

(3) Whether or not conduct on the part of the trial Court judge and the Government in obtaining evidence used against Petitioner constitutes the denial of Petitioner's Constitutional right to due process of law.

(4) Whether or not the proof and evidence against Petitioner is sufficient to support a conviction of unlawful importation of a controlled substance.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and the Fifth Amendment to the Constitution of the United States.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner was indicted for unlawful possession with intent to distribute marijuana, a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); aiding and abetting possession with intent to distribute three hundred pounds of marijuana in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2(a); and importation of a controlled substance in violation of Title 21, United States Code, Section 952(a) and 960(a)(1), and Title 18, United States Code, Section 2(a).

On November 28, 1973, the United States District Court for the Southern District of Texas, Laredo Division, heard testimony regarding Petitioner's Motion to Suppress and on November 30, 1973, Petitioner filed an amplified Motion to Suppress Evidence and to dismiss the indictment based on new facts adduced at said pre-trial hearing. The Court thereafter carried such Motions and testimony on the Motions throughout the trial. On November 30, 1973, Petitioner filed a Motion for the trial judge to recuse himself as a necessary witness. This Motion was denied on December 3, 1973, and Petitioner was tried by the Court sitting without a jury.

Richard Glenn Byrd, previously convicted co-conspirator, was arrested on May 9, 1972, at 1:30 A.M. driving northeast on Highway 59 toward Freer, Texas. *United States v. Byrd*, 483

F.2d 1196 (5th Cir., 1973), correctly states the facts of the search of the vehicle driven by Byrd and seizure of evidence introduced against Byrd and Petitioner.

The vehicle driven by Byrd was stopped 45 miles from the Mexican border, without warrant and without prior notice to the Immigration officers of the probability that a crime had occurred, to ascertain whether the vehicle carried aliens. It was ascertained by the officers that Byrd was a United States citizen. One of the officers then inserted himself through the window of the vehicle and inspected the rear seat to determine if Byrd was importing illegal aliens into the country. At the time the officer had the upper half of his body inside the automobile, he detected the odor of marijuana emanating from the vehicle. Byrd reluctantly gave a trunk key to the officer. The trunk of the automobile was opened and the contraband was discovered. A Texaco credit card issued to Petitioner was also found in the automobile and confiscated.

Subsequent to Byrd's conviction and prior to sentence, Byrd called his attorneys and was concerned about discussions that took place between him and Dan Beto, a United States Probation Officer. Attorneys for Byrd and Petitioner were informed by the Assistant United States Attorney that nothing presented to the sentencing judge by way of pre-sentence report on Byrd would be utilized by him in the future as to Petitioner. One of the attorneys for Byrd and Petitioner called Beto wanting to know what Beto was doing to Byrd. Beto advised attorney Caswell that he wanted more information out of Byrd. Byrd was then advised by Caswell to cooperate in order to obtain a favorable presentence report. Byrd's attorneys advised Byrd on more than one occasion that if he desired to plead guilty prior to trial and become a Government witness, he would possibly receive some benefit therefrom and that if he desired to testify a conflict of interest would arise and they would obtain a new attorney for Petitioner.

Unknown to attorneys representing Byrd and Petitioner, the Court received a pre-sentence report from Beto indicating that Petitioner was involved and at this time and place the Court felt that Byrd had been inadequately represented and that there was a possible conflict of interest between Byrd and Petitioner. The Court then, without notice to Petitioner's attorneys, directed Beto to interview Byrd and inform him that he (Byrd) should carefully examine his situation and indicate whether or not it might not be to his own best interest to obtain new counsel to represent him. Byrd was interviewed and Beto indicated to Byrd that appeals were seldom granted and that he (Byrd) was not getting proper legal representation. Beto also offered Byrd, subsequent to conviction, new counsel at Government expense. Byrd then attempted to reach his attorneys indicating to one of them that the Government was "playing with his mind". Shortly thereafter, Byrd approached Beto requesting the giving of a statement. Beto reported this to the trial and sentencing judge. The judge then called Laredo, Texas, and set up the appointment for Byrd's statement. Beto informed Byrd of the time and place to report for giving the statement. Byrd traveled to Laredo, Texas, on a Sunday, met with agent Max Pouley of United States Customs, and on May 28, 1973, gave a statement implicating Petitioner and others. Byrd traveled to Houston and sought out Beto a third time the following day to confirm to Beto that he (Byrd) had, in fact, made a statement as desired by Beto, intending that this information be given to the sentencing judge in an attempt to mitigate the already imposed sentence. Byrd testified that in his conversations with Beto, Beto was predominantly interested in investigating the case further, and not Byrd's background—another probation officer accomplished Byrd's background information—that Beto had further enlarged on the Court's directions and indicated that he (Byrd) would be lucky to get off with a ten-year sentence. Byrd further characterized Beto as an investigator, and under this coercion by Beto, delivered the statement implicating Petitioner.

On appeal to the United States Court of Appeals for the Fifth Circuit, the conviction of Richard Glenn Byrd was reversed, *United States v. Richard Glenn Byrd*, 43 F.2d 1196 (5th Cir., 1973). The Fifth Circuit held that on the basis of *Almedia-Sanchez v. United States*, 93 Sup. Ct. 2535, 37 L. ed. 2d 596 (1973), the search of the vehicle driven by Byrd was illegal and all evidence obtained thereby was inadmissible and any criminal proceedings against Richard Glenn Byrd was a nullity.

On trial in the District Court, the prosecution called Hertz representatives from Houston and Jackson who placed before the Court the lease agreement whereby Petitioner leased two vehicles on behalf of co-conspirators Byrd and Price. The lease agreements pertaining to both vehicles were introduced, indicating Petitioner's possessory interest. By stipulation, the Texaco credit card belonging to Petitioner and found in the vehicle driven by Byrd was also introduced into evidence. A Texaco employee presented evidence of the charges to Petitioner's credit card pertaining to co-conspirator Price. Escobedo, the border officer, testified essentially to the same facts and circumstances as to Byrd's arrest that he testified to on September 28, 1973. Co-conspirators Price and Webb testified essentially that they had made similar trips to those discovered in the Byrd arrest pursuant to transportation directions of Petitioner. No evidence of contraband was introduced pertaining to these trips. No testimony was given on importation or that marijuana came into the United States unlawfully.

Petitioner has asserted throughout these criminal proceedings that the search complained of was without warrant or probable cause, was not incident to an arrest, and did not fit into the exception of the warrant requirement, and therefore, unconstitutional. Petitioner further continuously asserted his possessory interest in the vehicle driven by Byrd, his standing to complain of the illegal arrest, and that all physical evidence and oral evidence obtained therefrom could not be utilized by the Government as it was "fruit of the poisonous tree".

REASONS FOR GRANTING THE WRIT

We believe that this case furnishes the Court two distinct and important issues which have imposed insurmountable confusion in the lower federal courts regarding the issues raised by this Court in *Almeida-Sanchez v. United States*, supra, and a much needed ruling on the status of leasehold interest concerning property which is the subject of a search. The search here is the same search considered by the Fifth Circuit Court of Appeals in *United States v. Byrd*, supra, which was initially decided September 7, 1973, subsequent to *Almeida-Sanchez*, supra, which was decided June 21, 1973. (See Appendix D).

The search here and in Byrd was ruled unconstitutional by reason of *Almeida-Sanchez* and *United States v. Storm*, 480 F. 2d 701 (5th Cir. 1973); *Marsh v. United States*, 344 F.2d 317 (5th Cir. 1965), and *United States v. Bursey*, 491 F.2d 531 (5th Cir. 1974).

On Petition for Rehearing, May 28, 1974, the Fifth Circuit Court of Appeals ruled that *Almeida-Sanchez* would be given only prospective application, abandoned reliance upon this authority and sustained the prior reversal of Byrd on Marsh, etc., supra. (See Appendix E).

The Lower Court here had foreguidance on December 3, 1973, *Almeida-Sanchez* and *Byrd*, supra.

In the interim period the Fifth Circuit Court of Appeals decided *United States v. Miller*, 492 F.2d 37 (1974), which held that *Almeida-Sanchez*, supra, should be given only prospective application. The search in question under either of the two theories of law is undoubtedly an illegal search and seizure. Whether the Supreme Court desired that it have only prospective application is an unsettled issue. Does prospective application apply to a search prior in time to the Supreme Court's

decision ruling same illegal where the cause has not been fully heard through appellate tribunals? Does *Almeida-Sanchez* hold that where a search commenced prior in time to the decision but where a defendant is tried subsequent to the ruling, prospective application of the ruling that the search is illegal and unconstitutional prohibits Petitioner McConnell from urging same? Does not the lessee of an automobile who pays the rental thereon have sufficient possessory interest to object to an illegal search and seizure where an agent of lessee has physical custody of the vehicle at the time of search?

The confusion below in the Fifth Circuit Court of Appeals regarding *Byrd* and *Miller*, supra, together with the fact that Byrd is now before the Fifth Circuit Court of Appeals for another Petition for Rehearing En Banc provides this Court with the opportunity in this case (where the identical same factual situation is presented) to establish the necessary guidelines to avoid a multiplicity of more litigation in appeals of this nature.

This case further provides the Court the clear cut opportunity to establish the necessary guidelines on lower trial courts in the utilization of a pre-sentence report to further pursue a co-defendant represented by identical counsel by the judiciary fostering further investigation by and through a probation officer against an accused.

ARGUMENT

The accused by and through his counsel properly protected the record below in making the necessary legal motions to suppress evidence obtained in the search of accused's vehicle driven by Byrd. The record indicates the search of this vehicle was not made pursuant to warrant nor to the probability that a crime had occurred or was about to occur and the facts concerning the search fall within the purview of *Almeida-Sanchez*, supra.

In any event the Fifth Circuit Court of Appeals indicated once and for all that either based on *Almeida-Sanchez*, supra, and/or *Marsh*, supra, the search was illegal. The issue today is moot. The knowledge that the search was considered illegal was known to the trial court prior to trial, during trial and subsequent thereto where an extensive brief was furnished the lower court before it rendered its opinion. The lower court in its opinion alluded to the fact that Petitioner had standing to object since he could be considered a lessee of the vehicle. The lease was introduced into the record with Petitioner's name inserted where the lessee is to be inserted and the record shows Petitioner paid for the consideration for the lease.

The arrest of Byrd and the facts flowing therefrom as to this Petitioner are co-related and interdependent one upon the other. The personal and possessory interest attached and accrued to Petitioner simultaneously with the hiring of the vehicle. Petitioner paid for the gas which enabled the vehicle to operate. The issue as to whether Petitioner had to be the actual driver of the vehicle is settled in *Jones v. United States*, 80 S.Ct. 725 at 731, 362 U.S. 257 at 261, 4 L.Ed. 2d 697, 78 ALR2d 233 (1960) which held:

> "To establish 'standing', courts of appeals have generally required that the movant (for suppression of illegally

> seized evidence) claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."

"A substantial possessory interest" is precisely the interest of Petitioner as lessee. He had the right to possession by contract with the lessor Hertz, and we contend that driver presence is not a criterion for possessory interest. The Ninth Circuit has ruled on this point where the owner of an automobile allowed an unlicensed operator to utilize the vehicle and where search followed:

> "We cannot agree with this contention. In order to establish standing to contest a search, a defendant must show that he owned or possessed the seized property *or* that he had a possessory interest in or was present at the premises searched. An additional consideration arises from the fact that when the crime charged is one of possession, a defendant will not be forced to sacrifice his Fifth Amendment rights in order to assert his Fourth Amendment rights. (Citations omitted). We conclude that appellant's ownership of the automobile conferred standing upon him to challenge the validity of the search and the admissibility of the evidence seized." *Cash v. Williams*, 455 F.2d 1227 at 1229-1230 (9th Cir. 1972).

We further cite *Weed v. United States*, 340 F.2d 827 (1965) which holds:

> "Defendant who claimed possessory interest in automobile which he had rented and who stated at time of his arrest that it was his, had standing to object to search without warrant of automobile in which firearms were found, although defendant did not claim possessory or proprietary interest in the firearms." (p. 827).

Lastly, the Fifth Circuit Court of Appeals has previously ruled in accordance with Petitioner's contentions. See *Lovette v. United States*, 230 F.2d 263 (5th Cir. 1956):

> "Of the first ruling, that defendant, having disclaimed interest in, or possession of, the premises searched and the property seized, could not be heard to invoke the personal privilege of the Fourth Amendment, it is sufficient to say that no point of law is more firmly settled than the guarantee of the Fourth Amendment against unreasonable searches and seizures is personal and can be raised only by one who, at the least, claims ownership or possession of, *or connection with the premises searched or the property seized*. The cases so holding are legion." (Emphasis added) p. 263.

The Ninth Circuit further recognizes Petitioner's contention in *Jones v. United States* supra, wherein it stated:

> "(That case) modified this rule to include in the class of an 'aggrieved person' not only one against whom the search was directed or had a traditional property interest in the thing seized or searched, or was legally present on the searched premises but also one who is being charged with either actual or constructive possession of the seized property. Sandejas v. U.S., 428 F.2d 1040 at 1043 (9th Cir. 1970)."

The Petitioner's standing is further substantiated by the Second Circuit in *United States v. Lee Wan Nam*, 274 F.2d 863 at 865 (1960):

> "The victim of an illegal search and seizure has been consistently defined as one who either has a *right to possession of the premises* searched or has a possessory interest in the property seized." (Emphasis added).

The next issue which we ask the Court to rule upon is the exploitation of victims of an illegal search and seizure which ultimately provides the necessary evidence to further a prosecution. The identity of other witnesses produced through exploitation by the government of an illegal act has been con-

demned. A case in point is *United States v. Tane*, 329 F.2d 848 (2nd Cir. 1964), which stated:

> "Indeed the record demonstrates that the identity of Pase and knowledge of his implication in unlawful payments was derived from the wire tap, and that Pase was unwilling to testify or even admit to making any unlawful payments until he was told by the assistant district attorney that the conversation between his attorneys and the union officials had been tapped. *The road from the tap to the testimony may be long, but it is straight.*" p. 853 (Emphasis added)

The lower court, knowing that Byrd had knowledge of Petitioner, insidiously proceeded to work on Byrd through a probation officer after the lower court had found him guilty and while both Byrd and Petitioner were represented by the same counsel, thus in effect depriving Petitioner of counsel. Byrd was advised by Petitioner's and his counsel that he would prevail in his appeal to the Fifth Circuit Court of Appeals due to *Almeida-Sanchez*, supra, while on the other hand the Government continued to advise Byrd out of the presence of his counsel that he would receive a heavy penitentiary sentence. The coercion was accomplished with sophistication, with the knowledge of the trial court, and it achieved the desired results with Byrd ultimately giving a statement to Customs which gave to the Government two other witnesses who by their testimony assisted the Government and received sentences with probationary terms while Petitioner was sentenced to ten years confinement.

We have in this series of incidents and legalities three defendants escaping incarceration with the same guilt attached to each and with the Petitioner entering the penitentiary for confinement on November 8, 1974, the date of this writing. It would be difficult in the absence of attenuation for the Government to argue that the chain of events leading from the search

of McConnell's vehicle driven by Byrd did not culminate with the arrest and conviction of Petitioner. Statements derived by illegal searches and seizures have always been regarded as fruit of the poisonous tree and statements of witnesses coerced by threats of severe punishment depriving them of their free will have heretofore been deemed inadmissible. We cite the case of *United States v. Marder*, 474 F.2d 1192 (5th Cir. 1973):

> "Proof that the witness would have come forward by his own volition, regardless of his identification by the illegal search, would be extremely relevant to a determination of attentuation. United States v. Hoffman, 385 F.2d 501, 504 (7th Cir. 1967)." p. 1196.

We further cite *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966), which excluded an incriminating statement by the driver of an automobile because such statement was triggered by an illegal search of that automobile, such statements being regarded as fruit of the poisonous tree and inadmissible.

The pervasiveness of the taint of illegality did not end because the enforcement officials sought an alternate method which is not divorced from the original illegality. We do not contend that the exclusionary rule is a blanket disclaimer. This Court has ruled on this point in *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

However, the evidence obtained in the Lower Court emanated in a continuous stream from one single source, the unlawful search of McConnell's vehicle driven by Byrd. The Government, in the record, made no contention that there was any independent investigation which resulted in Petitioner's second arrest. The record reveals, on pre-trial hearing on motions to suppress in the Judge's Chambers, that the Judge himself set in motion a chain of events with a probation officer named Beto wherein Beto enlarged upon the directions of the Judge and acting as an arm of the Court, out of the presence

of Petitioner's and Byrd's counsel, undermined Byrd's confidence in his attorneys and who, under coercion, made a statement leading to the arrest and conviction of Petitioner. A reading of the record indicates that but for the original illegal search and seizure such statement would not have been made and should have been suppressed and the failure of the Lower Court to recuse himself upon motion being properly made as to being a material witness in the case was prejudicial error. We have here a Lower Court Judge who, prior to trial, was intimately acquainted with each facet of the Byrd case, had actually sat in judgment upon Byrd, and who, prior to the first day of the trial, knew of the Petitioner's involvement as he had the probation officer report back to him the results of the probation officer's success in undermining Byrd. The Judge himself set up the appointment with Customs in Laredo, Texas, for Byrd to give his statement involving McConnell. The Lower Court's knowledge of the case through a pre-sentence report regarding one defendant, while represented by identical counsel of the second defendant, McConnell, gave information to the Judge which was inherently unfair to Petitioner and deprived him of his rights of an evidentiary hearing as opposed to the facts contained in a pre-sentence report with all hearsay involved. The same Judge sat in Petitioner's case without jury. See *Williams v. New York*, 337 U.S. 241-253, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), wherein the Court stated:

> "In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial

> of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to that narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment *after the issue of guilt has been determined.*" (Emphasis added.)

The pre-sentence report is a vehicle to fully inform the judiciary with emphasis directed to the needs of a particular defendant and the proper punishment which would flow therefrom after a consideration of the report. We contend it was never the intention that a pre-sentence report be utilized by the United States Government through the judiciary to prosecute another subject where the same Judge would sit in judgment on this subject. The philosophy underlying pre-sentence reports is succinctly stated in a state decision in *Morgan v. State*, 142 So.2d 308 (Fla. 1962):

> "A sentencing judge is concerned with the human equation, which comprises broadly defined considerations; conversely, rules of trial evidence and procedure circumscribe within a limited and defined scope the factors which may be deemed pertinent to the guilt or innocence of an accused as to some specific offense. The subject of a trial is a defendant, or one who is resisting the charge against him. When the time of sentencing arrives, this role has changed and he, instead, is one already convicted, either by his own admission or by the evidence notwithstanding his defense. Through the pre-sentence investigation uninhibited truths may be gleaned which might or could aid him; and the scrutiny of the investigation report by the judge is for the purpose separate and apart from the purpose of a trial. * * * These are not things which lend themselves to the restrictions of trial procedure and the rules of evidence."

The Lower Court Judge ordering his probation officer to inquire into the propriety of Byrd being represented by Petitioner's counsel without calling in the counsel, left at this point in time and place McConnell without counsel. The affidavits and testimony of Petitioner's counsel is in the record and this Court could adequately grant certiorari in the interest of justice on the testimony and issues and implications presented without the necessity of further argument by counsel here. The presentence report and the inquiry resulting therefrom gave to the Lower Court factual knowledge which we feel prior to trial is prohibited. See *Gregg v. United States*, 394 U.S. 489, at 492, 22 L.Ed.2d 442, 89 S.Ct. 1134 (1969), wherein the Court stated:

> "Submission of the report to the Court before (the determination of guilt) constitutes error of the clearest kind."

The record in this case substantiates a premature presentation to the Trial Court of facts which might have influenced determination of the guilt of McConnell. The knowledge of the Trial Court which was unknown to Petitioner prior to the hearing on motion to suppress and his bearing as a witness is substantiated without question in the record. The probation officer, after receiving directions of the Lower Court, made a promise of reward to Byrd in that he would receive a lesser sentence than had been previously imposed upon him by the Lower Court. When Byrd and McConnell's counsel objected to the harassment Byrd was receiving by the probation officer, this same Federal officer responded, "We would like to get some more information out of him." Byrd testified that this conduct frightened him. The record is replete and uncontradicted that the Lower Court Judge initiated the probation officer's continued investigation with this officer enlarging upon the court's direction and that these facts resulted in McConnell's indictment. Byrd's testimony in the record says it all:

> "And he then told me that he believed that the counsel that I had defending me was not worried about my welfare; that they were more worried about the person or people, whoever was paying them. They were worried about their welfare and that I would be lucky if I got a minimum of ten years. Mr. Beto said that if I would make a statement to customs, if I had told them more than I had told them, that he would try to grant, see it wasn't in his power, but to talk to the Judge, and see maybe if I could get a lighter sentence, and make it light on myself. In other words, he wanted me to spill the beans."

Beto's activities were initiated by the Bench and he acted as an arm of the Court and Petitioner was the victim of these illegal actions. The Fifth Circuit Court of Appeals has condemned this type activity. We cite *Herman v. United States*, 289 F.2d 362 (5th Cir. 1961), at page 365:

> "A trial judge should never assume the role of prosecuting attorney and *lend the weight of his great influence to the side of the government.*" (Emphasis added.)

The secret interview out of the presence of Byrd's and Petitioner's attorneys which has further been condemned in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) at page 205:

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crimes."

The Fifth Circuit has further held on the matter of voluntary consent in *Alexander v. United States*, 390 F.2d 101 (5th Cir. 1968) at page 110:

> "Intimidation and deceit are not the norms of voluntarism. In order for the response to be free, the stimulus must be

devoid of mendacity. We do not hesitate to undo fraudulently induced contracts. Are the disabilities here less maleficient? In a case which deals with a quite similar issue of police camouflage, the Second Circuit concluded with the following words:

'Although the line between an accused's voluntary consent and his involuntary submission to police authority is often difficult to draw, we are persuaded that on the record before us there has not been a sufficient showing of true consent, free from chicanery or compulsion. To hold otherwise in these circumstances would, as the late Justice Jackson once eloquently remarked, "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law," Johnson v. United States, 333 U.S. 10, 17, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948). The civilized standards of fundamental fairness developed over the years in this area must be zealously guarded by the trial and appellate courts if the guarantees of the Bill of Rights are to be kept meaningful and not permitted to evaporate through silent abrogation.' United States v. Como, 2 Cir. 1965, 340 F.2d 891, 894-895."

The probation officer and Byrd had an agreement that Beto would report to the Judge that the favorable statement had been made and once again the possible modification of his sentence was the overriding influence which produced the statement involving McConnell. We say that this type activity is condemned in *Weed v. United States*, 340 F.2d 827 (10th Cir. 1965) at page 829 where the Court held:

"Particular words of consent must always be weighed in light of the atmosphere and totality of circumstances in which they are spoken in order to determine the intent and voluntariness of the words."

The issue of Petitioner's guilt is not an issue here for we rely on *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1092, 81 S.Ct. 1684, where this Court has stated:

> "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine, 'the criminal is to go free because the constable has blundered.' People v. Defore, 242 NY, at 21, 150 NE at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, 'there is another consideration—the imperative of judicial integrity.' 365 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

We are, therefore, obliged to argue that the Fifth Circuit established the primary illegality of the search and seizure and the continuing exploitation of that primary illegal act resulted in the conviction of Petitioner McConnell. We say that but for the original search and seizure and the acts emanating therefrom, McConnell would have never been involved whatsoever.

We further state that when the Lower Court Judge chose to testify and offered himself for cross-examination on the pretrial hearing on November 28, 1973, then by his own act he became a witness in the case and was totally and absolutely disqualified to sit in judgment on the accused. We rely on 28 USC 455 which states:

> "Any justice or judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . ."

See further *United States v. Hughes*, 325 F.2d 789 (2nd Cir. 1964), where the disqualification is required if the Judge is a

witness. See further *Tyler v. Swenson*, 427 F.2d 412 (8th Cir. 1970), where we find the following:

> "It has long been recognized under similar circumstances that a judge cannot serve as a material witness as well as the trier of fact. (Citations)
>
> " 'Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded as partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair advantage by admitting the presiding judge as a witness is very obvious.' "

There is no evidence of record reflecting that contraband was unlawfully imported or brought into the United States and yet this accused was convicted of smuggling. See *Davis v. United States*, C.A.N.M. 1965, 347 F.2d 378. See also *United States v. Chapman*, D.C. Va. 1971, 321 F.Supp. 767.

The requirements and evidence necessary for proof of smuggling was not mentioned in the Lower Court's decision. No mention was made by the Fifth Circuit Court of Appeals regarding these contentions and with the absence of such proof of the elements of smuggling, the Petitioner's conviction is deserving of certiorari.

CONCLUSION

Petitioner respectfully submits that a review of the record and the appendices attached hereto would indicate that this Petition for Writ of Certiorari should be granted, and the judgment of the Lower Court and the Fifth Circuit Court of Appeals which affirmed the judgment of the Lower Court should be set aside and the judgments of conviction reversed.

Respectfully submitted

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APPENDIX "A"

United States of America, Plaintiff-Appellee,

v.

James H. McConnell and Robert Connerly,
Defendants-Appellants.

No. 74-1808

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1974.

Defendants were convicted in the United States District Court for the Southern District of Texas at Laredo, Ben C. Connally, Chief Judge, of conspiracy to possess with intent to distribute marijuana. Defendants appealed. The Court of Appeals held that the search of a vehicle rented from a rental company by a codefendant was not a search against defendant, there being no defalcation as to defendant, and thus he had no standing to object to legality of the search or to invoke the fruit of the poisonous tree doctrine. Evidence sustained conviction for conspiracy; the case against the two defendants was proved beyond peradventure by testimony of two co-conspirators.

Affirmed as to appealing defendants.

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* Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409.

1. Criminal Law Key 394.5(2)
Searches and Seizures Key 7(26)

Where search of vehicle rented from rental company by co-defendant on defendant's credit was not search against defendant, there being no defalcation as to defendant, he had no standing to object to legality of search or to invoke fruit of poisonous tree doctrine.

2. Criminal Law Key 655(1)

That court advised probation officer to explain to codefendant, defendant's employee, that codefendant's lawyers who were employed for him by defendant might have conflict of interest as between defendant and codefendant and that such advice was given in turn to codefendant and that codefendant some four months later made statement implicating defendant did not show any impropriety amounting to error.

3. Conspiracy Key 47(12)

Evidence sustained conviction for conspiracy to possess marijuana with intent to distribute; case against two defendants was proved beyond peradventure by testimony of two coconspirators. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Appeals from the United States District Court for the Southern District of Texas.

Before Bell, Simpson and Morgan, Circuit Judges.

Per Curiam:

This appeal involves McConnell and Connerly. They were jointly indicted but had separate trials. We will first consider McConnell's case.

McConnell, a wholesale distributor of marijuana and the employer of Byrd, Connerly and others to transport the marijuana, see Byrd v. United States, 5 Cir., 1973, 483 F.2d 1196; 5 Cir., 1974, 494 F.2d 1284, was apprehended as the result of a chain of events which began with the search of Byrd's vehicle and his subsequent arrest. The chain included a credit card found in the Byrd vehicle which was issued to McConnell; the fact that McConnell paid Hertz for the lease to Byrd of the vehicle in which Byrd was apprehended; and later, some months after Byrd was sentenced, a statement from Byrd as to McConnell's endeavors and the *modus operandi* thereof.

Relying on the holding of this court that the Byrd vehicle search was illegal, McConnell contends that his apprehension and conviction falls under the fruit of the poisonous tree doctrine. His problem, however, is in his lack of standing to contest the search of the Byrd vehicle.

The trial of McConnell was to the district court without a jury. The comprehensive findings and conclusions of the district court, include, *inter alia*, a finding that the Byrd vehicle was leased to Byrd in Houston on the credit of McConnell, arranged by McConnell with Hertz in Jackson, Mississippi through the use of an American Express card.

[1] The search was not against McConnell; there was no defalcation as to him. Altizer v. United States, 5 Cir., 1973, 477 F.2d 846. In addition, there was no showing whatever that appellant had a reasonable expectation of privacy with respect to the Byrd vehicle. United States v. Mendoza, 5 Cir., 1973, 473 F.2d 692 at 695, 696; United States v. Bell, 5 Cir., 1972, 457 F.2d 1231 at 1239. See generally Alderman v. United States, 1969, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176; Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; Mancusi v. Deforte, 1968, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154.

[2] McConnell urges conduct on the part of the district court and a probation officer as an impropriety amounting to error in the failure of the court to grant his motion to suppress. The facts were that at the sentencing of Byrd, the court learned of his employment by McConnell and that McConnell had employed counsel for Byrd. The court advised the probation officer to explain to Byrd that his lawyers might have a conflict of interest as between McConnell and Byrd. This advice was given, in turn, to Byrd and some four months later he made his statement implicating McConnell. We have carefully reviewed this occurrence and its various elements. We find no error.

[3] As to Connerly's case, no nexus whatever is shown between Connerly and the search of Byrd's vehicle. Connerly was an employee of McConnell, just as was Byrd, and was paid by the trip to transport marijuana from the Mexican border to various American cities. The evidence was entirely sufficient to warrant the conviction by the court in a nonjury trial on the count charging a conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C.A. § 841(a)(1). The case against Connerly as well as against McConnell was proved beyond peradventure by the testimony of two other McConnell employees, co-conspirators Price and Webb.

Affirmed as to McConnell and Connerly.

APPENDIX "B"

In the United States Court of Appeals
For the Fifth Circuit

No. 74-1808

United States of America,
Plaintiff-Appellee,

versus

James H. McConnell and Robert Connerly,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(Filed October 15, 1974)

Before Bell, Simpson and Morgan, Circuit Judges.

Per Curiam

It Is Ordered that the petition for rehearing filed on behalf of Robert Connerly in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "C"

In the United States District Court for the
Southern District of Texas
Laredo Division

United States of America,

vs.

Robert Connerly.

Criminal No.
73-L-238

ORDER THAT DEFENDANT SURRENDER TO UNITED STATES MARSHAL

(Filed November 1, 1974)

This Court having heretofore rendered judgment herein, and the Untied States Court of Appeals for the Fifth Circuit having affirmed such judgment and issued its mandate pursuant thereto,

(X) and having denied a petition for rehearing

( ) and a petition for certiorari having been denied by the Supreme Court of the United States

(X) and no petition for certiorari having been filed, it is therefore

Ordered that the defendant herein, Robert Connerly, surrender himself into the custody of the United States Marshal for the Southern District of Texas at Houston, Texas, pursuant to the said judgment of this Court, at 10:00 A.M. on the 8th day of November, 1974.

It is further Ordered that the Clerk of this Court shall send copies of this Order by mail to the said defendant, to his attorney(s) of record, and to his bail bondsman, and also two copies to the United States Marshal for the Southern District of Texas.

Signed at Houston, Texas, on this 1st day of November, 1974.

/s/ (Illegible)
United States District Judge

Approved and Entry Requested:

Anthony J. P. Farris
United States Attorney

True copy I certify.

Attest:

V. Bailey Thomas,
Clerk

/s/ By Mary A. Prater
Deputy Clerk

By: /s/ Mary L. Sinderson
Assistant United States Attorney

APPENDIX D

In the United States Court of Appeal
for the Fifth Circuit

No. 73-1426

Summary Calendar*

United States of America,
Plaintiff-Appellee,

versus

Richard Glynn Byrd,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(September 7, 1973)

Before Bell, Godbold and Ingraham,
Circuit Judges

Ingraham, Circuit Judge: Appellant Richard Glynn Byrd was convicted in a nonjury trial of possessing with intent to distribute 300 pounds of marijuana[1] and of carrying a firearm

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* Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409.

[1] 21 U.S.C. § 841(a) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

while committing this felony.[2] Byrd seeks reversal of his conviction on the basis that the marijuana was discovered in a constitutionally illegal search and is therefore inadmissible as evidence against him. On the facts of this case, the warrantless search of appellant's vehicle by roving border patrol agents forty-five miles from the Mexican border cannot be upheld. The judgment is Reversed.

The facts are typical and undisputed. At 1:30 A.M. on May 9, 1972, Byrd was driving northeast on Highway 59 toward Freer, Texas. At a distance of forty-five miles from the Mexican border at Laredo, Texas, Byrd was stopped by a roving border patrol manned by Officers Escobedo and Lohman of the United States Immigration and Naturalization Service. After ascertaining that Byrd was a United States citizen and had a valid Texas driver's license, Escobedo inspected the rear seat of appellant's car to determine if he was importing illegal aliens into the country. At a time when he had the upper half of his body inside the automobile, he detected the pungant odor of marijuana[3] emanating from somewhere within the vehicle. The officer then obtained the trunk key, opened the trunk, and found that his nose had not betrayed him; 300 pounds of marijuana was discovered in the trunk. After advising Byrd of his *Miranda* rights, the officers were informed that a loaded pistol was under the front seat, which they then recovered.

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[2] "Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

18 U.S.C. § 924(b).

[3] The odor of marijuana often leads to its discovery. *United States v. Storm*, — F.2d — (5th Cir., 1973) [No. 72-3138, June 22, 1973]; *United States v. Wright*, 476 F.2d 1027 (5th Cir., 1973); *United States v. Thompson*, 475 F.2d 1359 (5th Cir., 1973).

At trial the only issue was whether the marijuana was discovered in a constitutionally permissible search and thereby admissible as evidence. Officer Escobedo testified that Byrd's car was stopped for a routine immigration inspection. Other than the presence of the car on the highway at an hour when few vehicles were traveling between Laredo and Freer and the officer's knowledge that "many cases" had been made "at that time of morning . . . out there on that particular road," there were no facts to arouse the officer's suspicions that Byrd was transporting illegal aliens. Officer Escobedo said he and his partner would have been just as suspicious of any other vehicle.

The district court upheld the search on the basis of a two pronged analysis. First, the court believed that the initial intrusion, the stop, was justified by 8 U.S.C. § 1357(a) and the accompanying regulation, 8 CFR § 287.1(a)(2), which authorize immigration officials to conduct warrantless searches of vehicles for illegal aliens within one hundred miles of an international border. The court next reasoned that once a vehicle has been validly stopped for an immigration search and the immigration officers, in the course of a search for aliens, detect circumstances—the smell of marijuana for example—supporting the belief that the customs laws are being violated, the officers may then don their customs hats and complete the search to determine if illegal contraband is being transported.

The second facet of the district court's analysis is a correct application of the principles of law relating to searches by border patrol officers. *See United States v. Wright*, 476 F.2d 1027 (5th Cir., 1973); *United States v. Thompson*, 475 F.2d 1359 (5th Cir., 1973); *United States v. McDaniel*, 463 F.2d 129 (5th Cir., 1973); *United States v. Maggard*, 451 F.2d 502 (5th Cir., 1971).[4] Whether the search here passes constitutional

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[4] The two-hat theory was explained by Judge Goldberg in *McDaniel*, 463 F.2d at 134, as follows:

> "It appears that Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer. The

muster depends, therefore, on the propriety of the initial intrusion by the border patrol agents when they stopped Byrd's vehicle to search for aliens. To resolve this issue we must examine it against the standards established in the recent Supreme Court decision of *Almeida-Sanchez v. United States*, — U.S. — (1973) [41 U.S.L.W. 4970, June 19, 1973].

The facts there are very similar to those in the case at bar:

> "[Almeida-Sanchez] was stopped by the United States Border Patrol on State Highway 78 in California, and his car was thoroughly searched. The road is essentially an east-west highway that runs for part of its course through an undeveloped region. At about the point where the petitioner was stopped the road meanders north as well as east —but nowhere does the road reach the Mexican border, and at all points it lies north of Interstate 80, a major east-west highway entirely within the United States that connects the Southwest with the west coast. The petitioner was some 25 air miles north of the border when he was stopped. It is undenied that the Border patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search—not even the 'reasonable suspicion' found sufficient for a street de-

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agents testified that they had planned to wear their immigration hats that night, but we find nothing in the statutes that would preclude them from later donning their customs hats during a proper border search."

And, Judge Rooney recently outlined the legal basis for the principle that a border patrol officer may be validly authorized to act simultaneously as a customs agent in *Thompson*, 475 F.2d at 1362:

> "By a series of proper delegations, border patrol officers have been designated by the Treasury Secretary as customs agents. '[A]ny officer of the Bureau of Customs of the Treasury Department . . . or any commissioned, warrant, or petty officer of the Coast Guard, or any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of Customs Service . . .' serves as a cus-

tention and weapons search in *Terry v. Ohio*, 392 U.S. 1, and *Adams v. Williams*, 407 U.S. 143."

Id. at — [41 U.S.L.W. at 4971]. The government defended the search on the basis of "§ 287(a) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a), which simply provides for warrantless searches of automobiles and other conveyances 'within a reasonable distance from external boundary of the United States,' as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation, 8 CFR § 287.1, defines 'reasonable distance' as 'within 100 air miles from any external boundary of the United States.'" *Id.* at [41 U.S.L.W. at 4971].[5]

The Court first noted that the search could not be justified on the basis of the automobile search exception to the Fourth Amendment's warrant requirement because there was not probable cause to believe that Almeida-Sanchez was violating any law. Although warrantless searches of automobiles may sometimes be necessary as a result of exigent circumstances, *e.g. Carlton v. Estelle*, —F.2d— (5th Cir., 1973) [No. 72-3544, June 28, 1973], such searches must nevertheless be founded on probable cause. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Carroll v. United States*, 267 U.S. 132, 149 (1925).

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toms agent. 19 U.S.C.A. § 1401(i). Under Treasury Dept. Order No. 165, Revised, 19 Fed.Reg. 7241 (T.D. 53654, 1954), empowering the Commissioner of Customs to act on behalf of the Treasury Secretary, the Commissioner delegated to special agents of the Bureau of Customs the authority to designate border patrol officers as 'acting Customs Patrol officers,' without compensation. Customs Delegation Order No. 42, 36 Fed.Reg. 13410 (T.D. 71-181, 1971). By letter/order of the Assistant Commissioner of the Bureau of Customs, dated July 14, 1971, all special agents were required to designate all current border patrol officers and future appointees as acting customs patrol officers."

[5] The Ninth Circuit upheld the search relying on the statute and the regulation. 452 F.2d 459, 461 (9th Cir., 1971).

See Carlton v. Estelle, supra; United States v. Soriano, —F.2d— (5th Cir., 1973) [No. 72-1520, July 2, 1973]. "Automobile or no automobile, there must be probable cause for the search" *Almeida-Sanchez v. United States,* —U.S. at — [41 U.S.L.W. at 4971]. It is readily apparent, and the government does not argue to the contrary, that the search in question here does not fit within the narrow automobile search exception to the warrant requirement.

After holding that the search was not supported by cases dealing with administrative inspections,[6] the Court was faced with the issue whether "the statute that purports to authorize automobiles to be stopped and searched, without a warrant and 'within a reasonable distance from any external boundary of the United States,' " *id.* at — [41 U.S.L.W. at 4972], was a constitutionally sufficient basis upon which to predicate the border patrol's stop and ensuing search of Almedia-Sanchez's vehicle.

The Court began by distinguishing between a border search, meaning a search at the border or its functional equivalent,[7] and

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[6] The Court distinguished *Camara v. Municipal Court,* 387 U.S. 523 (1967), *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970), and *United States v. Biswell,* 406 U.S. 311 (1972). As Mr. Justice Powell said in his concurring opinion, "one who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite." — U.S. at — [41 U.S.L.W. at 4975].

[7] "For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a non-stop flight from Mexico City would clearly be the functional equivalent of a border search."

Almeida-Sanchez v. United States, supra, at — [41 U.S.L.W. at 4972]. Under our prior decisions we have not been called upon to determine whether a particular search occurred at a functional equivalent of the border in order to determine the constitutionality of the search. And we are not faced with that problem on the record here. However, we note that one of our prior, and often cited cases, *United*

a search which occurs near a border.[8] This distinction is significant because the analysis it mandates will ultimately determine the standard for measuring the constitutionality of a particular search. The Court reasoned that searches at the border or its functional equivalent were not governed by normal Fourth Amendment principles. The federal government's undoubted power to exclude aliens "can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders." *Id.* at — [41 U.S.L.W. at 4972]. "When a person or vehicle is detained at the border *just after entering the country*, the agent's statutory authority to search is virtually unfettered except perhaps as to due process concerning the manner, not the cause, of the search. *E.G., Lane v. United States*, 8 Cir., 1963, 321 F.2d 573; *Blackford v. United States*, 9 Cir., 1957, 247 F.2d 745; *King v. United States*, 5 Cir., 1958, 258 F.2d 754." *United States v. Storm*, —F.2d— (5th Cir., 1973) (Emphasis added) [No. 72-3138, June 22, 1973, Slip Op. at 6]. *Carroll v. United States*, 267 U.S. 132, 154 (1925), provides the rationale for searches of this nature:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on

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States v. McDaniel, 463 F.2nd 129 (5th Cir., 1972), involves a factual setting which illustrates perhaps another example of a functional equivalent to the border. The search in that case occurred at a permanent checkpoint located on Interstate Highway 35, which runs northeast from Laredo to San Antonio; the checkpoint was established at a point seven miles from Laredo. Because the Rio Grande River parallels Interstate Highway 35 for five of those seven miles and furnishes a readily available avenue for the entry of illegal aliens, it could be plausibly argued that searches at that checkpoint occur at the functional equivalent of the border.

[8] The Court carefully avoided the common practice of labeling all searches occurring at or near a border, or involving a possible violation of the immigration or customs laws, as "border searches." *Compare Almeida-Sanchez v. United States, supra, with United States v. Martinez*, — F.2d — (5th Cir., 1973) [No. 72-2685, July 3, 1973]. The Court also implicitly rejected the often articulated idea that our international borders are "elastic" and thus provide a basis for diminished constitutional protection to those who travel near them.

> the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."

As a result of this reasoning it will be necessary for the courts to make an initial determination of whether a search is a border search as that term was narrowly defined by *Almeida-Sanchez*. This will be a somewhat different methodology than that required in the usual case where the rule is that warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few well-delineated exceptions," with "the burden . . . on those seeking the exemption to show the need for it." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). *See United States v. Soriano, supra*, —F.2d at—, n. 3. The special nature of a search at the border or its equivalent, however, renders the usual approach inappropriate; if a court decides that a search is a border search, it will not be required to determine whether the search is justified on the basis of a legally sufficient warrant or, if not, whether it is nonetheless proper under one of the exceptions to the warrant requirement. Moreover, the conclusion that a search is a border search will also answer the question concerning the constitutional principles applicable in determining the constitutionality of the search. It is therefore essential that lower courts, as did the Supreme Court in *Almeida-Sanchez*, first address the question whether a particular search is a border search.

In *Almeida-Sanchez* the Court concluded that a search by a roving patrol on a road "that lies at all points at least twenty miles north of the Mexican border" was not a border search and thus not governed by the lesser constitutional standard attending searches at the border or its equivalent. The Court was

thus left with an unconsented to search not authorized by a warrant and not fitting within any exception to the warrant requirement, a search justifiable, if at all, on the basis of the statute and regulation. Reasoning that "no Act of Congress can authorize a violation of the Constitution," the Court returned to basic Fourth Amendment doctrine and held: "In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.'" — U.S. at — [41 U.S.L.W. at 4972]. The effect of this holding is that lower courts must now for the first time apply familiar Fourth Amendment principles to determine the constitutionality of searches at points near a border but not at the border or its functional equivalent.

Applying these principles to the instant appeal, we hold that the search of Byrd's vehicle by a roving border patrol on a road forty-five miles from the Mexican border was unconstitutional. The only arguable distinction between our case and *Almeida-Sanchez* is that the road on which Byrd was stopped runs directly from the border to Freer, Texas. While a situation could be hypothesized in which this distinction might become significant, it does not make a constitutional difference under the facts of this case. The officers did not have a warrant authorizing the search. Nor was there probable cause to believe that Byrd was importing illegal aliens into this country. Indeed, the officers did not have any reason to believe that Byrd had even crossed the border or been in contact with anyone who had. Thus, while the search here is of doubtful constitutional validity under this Circuit's previous decisions, *e.g. United States v. Storm, supra; Marsh v. United States*, 344 F.2d 317 (5th Cir., 1965), it is assuredly unconstitutional under the probable cause standard established by *Almeida-Sanchez*. The district court erred in denying Byrd's motion to suppress the marijuana and the revolver seized in the search of his vehicle.

The holding of *Almeida-Sanchez* is narrow, but the reliance in the plurality opinion and in Mr. Justice Powell's concur-

ring opinion on traditional Fourth Amendment analysis makes it clear that lower courts must assess the constitutionality of searches in border areas under standards heretofore thought inapplicable to searches of this nature. Except in those searches conducted at the border or its functional equivalent, the touchstone is probable cause.[9]

On the basis of the preceding discussion Byrd's conviction is Reversed.

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[9] Because neither the plurality opinion nor the concurring opinion expressly consider the constitutional standard against which a search at a temporary or permanent checkpoint is to be measured, it will likely be argued that the standard will be something less than probable cause. A close reading of both opinions leaves us convinced, however, that probable cause is the standard. It should be noted that Mr. Justice Powell joined in the Court's opinion which closes with the following statement:

> ". . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

Almeida-Sanchez v. United States, supra, at — [41 U.S.L.W. at 4973], *quoting Carroll v. United States,* 267 U.S. at 154. Moreover, it is clear that while the four members of the Court who joined in the plurality opinion are not in agreement concerning the constitutional validity of an area search warrant, — U.S. at —, n. 3, all four plus Justice Powell agrees that searches, other than border searches, must be examined in traditional Fourth Amendment terms. Both the plurality and the concurring opinion serve to reaffirm the principle that warrantless searches are presumed unreasonable and that to justify a warrantless search it must be based on probable cause and also fit within one of the exceptions to the warrant requirement.

APPENDIX "E"

United States of America, Plaintiff-Appellee,

v.

Richard Glynn Byrd, Defendant-Appellant.

No. 73-1426.

United States Court of Appeals,
Fifth Circuit.

May 28, 1974.

Appeal from the United States District Court for the Southern District of Texas; Ben C. Connally, Chief Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 7, 1973, 5 Cir., 1973, 483 F.2d 1196.)

Before Bell, Godbold and Ingraham, Circuit Judges.

Per Curiam:

We grant appellee's petition for rehearing. In United States v. Miller, 492 F.2d 37 (5th Cir., 1974), the court held that Almeida-Sanchez v. United States, 1973, 413 U.S. 266, 93 S. Ct. 2535, 37 L.Ed.2d 596, should be given only prospective application. We therefore abandon any reliance upon *Almeida-Sanchez*. We do, however, sustain our prior reversal[1] upon the authority of United States v. Storm, 480 F.2d 701 (5th Cir., 1973), and Marsh v. United States, 344 F.2d 317 (5th Cir., 1965), as discussed therein. *See also* United States v. Bursey, 491 F.2d 531 (5th Cir., 1974).

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[1] *United States v. Byrd*, 483 F.2d 1196 (1973).

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-583

JAMES H. MCCONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 500 F. 2d 347. The memorandum and order of the district court (App., *infra*, pp. 1a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1974. A petition for rehearing was

denied on October 15, 1974 (Pet. App. A5). The petition for a writ of certiorari was filed on November 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner has standing to object to a search and seizure of evidence from an automobile rented by a co-conspirator, when petitioner guaranteed payment under the rental agreement but was never in possession of the vehicle and was not present at the time of the search.

2. Whether the evidence at petitioner's trial was tainted by statements of a convicted co-conspirator that were allegedly the product of undue coercion.

3. Whether the evidence is sufficient to sustain petitioner's conviction of illegally importing marihuana.

STATEMENT

After a trial without a jury before the United States District Court for the Southern District of Texas, petitioner was convicted of possessing approximately 300 pounds of marihuana with the intent to distribute it (count 2), conspiring to commit that offense (count 1), and smuggling marihuana into the United States (count 4), in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), 846, and 952 (Pet. 4; Tr. 132).[1] He was sentenced to five years'

[1] Petitioner was indicted together with Robert Connerly, who was tried separately and convicted on the conspiracy count.

imprisonment, with a special parole term of two years, on the first count; an identical sentence was imposed jointly on counts 2 and 4, to run consecutively to the sentence imposed on count 1 (Tr. 134-135). The court of appeals affirmed (Pet. App. A1-A4).

1. The facts, as developed at trial and at a pretrial suppression hearing, are reviewed in detail in the memorandum and order of the district court (App., *infra*, pp. 1a-7a, 11a-12a). On May 9, 1972, Richard G. Byrd was stopped by two Border Patrol agents on a "roving patrol" on U.S. Highway 59, approximately 40 miles east of the border town of Laredo, Texas. While inspecting the interior of Byrd's vehicle for concealed aliens illegally in the United States, one of the agents detected the odor of marihuana. An inspection of the trunk of the vehicle revealed approximately 300 pounds of marihuana. In addition to the marihuana, the agents found a rental car receipt showing the car to have been rented from the Hertz Corporation in Houston, Texas, with petitioner's name inserted in a "to be paid by" blank. A Texaco credit card in petitioner's name was also found in Byrd's possession.

Charges were filed with the United States Magistrate against Byrd and petitioner, but the charges against petitioner were later dropped. Byrd was subsequently indicted and convicted of possessing the marihuana with the intent to distribute it and of carrying a firearm in the commission of the felony. Prior to trial, Byrd made no statement concerning

his guilt or innocence or the involvement of any associates. He did not testify at his trial and offered no evidence in his own behalf.

Byrd was sentenced on January 8, 1973. In May 1973, he contacted Dan Beto, a probation officer for the court, and stated that he wanted to make a statement to the Customs Service. The court arranged an appointment for Byrd to meet with customs officials, and Byrd gave a statement implicating petitioner, among others, in the events that led to Byrd's arrest. Byrd thereafter appeared before a grand jury, and his testimony led to petitioner's indictment on the present charges.

On September 7, 1973, Byrd's conviction was reversed by the court of appeals (Pet. App. A8-A17), which concluded initially that the search of Byrd's vehicle was illegal in light of this Court's intervening decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266. On rehearing, the panel abandoned its reliance upon *Almeida-Sanchez*[2] but sustained its prior reversal of Byrd's conviction on the authority of other Fifth Circuit cases (Pet. App. A18).

2. At petitioner's trial, Border Patrol Agent Emilio Escobedo testified concerning the stop of Byrd's vehicle and the discovery of the marihuana therein (Tr. 20-30). Two employees of the Hertz Corporation testified that on April 19, 1972, Byrd and Julian D. Price rented two automobiles in Houston, Texas.

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[2] Another panel of the Fifth Circuit had subsequently ruled that *Almeida-Sanchez* should be given only prospective application (Pet. App. A18).

Arrangements for the rental were made through a Hertz office in Jackson, Mississippi. Petitioner, who was present at that office, agreed to guarantee the payment of the rental fee by allowing it to be charged on his American Express credit card. The rental agreements were made out to Byrd and Price, who took possession of the vehicles (Tr. 4-20). The license number of the car rented to Byrd on that date was the same as the number of the car carrying the marihuana that Byrd was driving on May 9 (Tr. 11, 22, 24).

Julian Price testified that he had known petitioner for a number of years and had "[t]ransported a bunch of marihuana" for him in 1972 (Tr. 31). He stated that he was hired by petitioner in August 1971 to accompany petitioner in transporting a quantity of marihuana from McAllen, Texas, to Atlanta, Georgia (Tr. 32-35), and again in February 1972, when Price and Byrd were hired by petitioner to drive loads of marihuana from Laredo, Texas, to Atlanta (Tr. 35-42). Price also related the arrangements that were made for petitioner to pay for the vehicles that Price and Byrd rented on April 19, 1972 (Tr. 42-46). He testified that he, Byrd, Jerry Webb, and Robert Connerly, acting pursuant to petitioner's instructions throughout the transaction, proceeded to Laredo, Texas, where they picked up loads of marihuana and transported them to Atlanta and Orlando, Florida (Tr. 45-53). He also testified that petitioner had arranged for Price and Byrd to trans-

port marihuana from Laredo, Texas, on May 9, 1972, the date of Byrd's arrest (Tr. 54-63).

Throughout the transactions, Price, Byrd, and the other drivers involved acted pursuant to specific instructions from petitioner concerning the manner in which the marihuana was to be picked up and transported. Jerry Webb, who had also been hired by petitioner to drive loads of marihuana on April 20 and May 9, gave testimony that essentially corroborated that of Price (Tr. 76-96).

In his defense, petitioner called Richard Byrd as a witness, but Byrd's testimony did not relate to the above-described events. Counsel for petitioner offered a stipulation to the effect that petitioner's Texaco credit card and a copy of the Hertz rental agreement were found in Byrd's vehicle at the time of Byrd's arrest, to which the government agreed (Tr. 99-102).

ARGUMENT

1. Petitioner contends (Pet. 10-12) that the marihuana found in Byrd's vehicle should have been suppressed as the product of an illegal search and seizure and that he has standing to make that claim.[3] Assuming *arguendo* that the pre-*Almeida-Sanchez* roving patrol stop and search of Byrd's vehicle were unlawful under the standards applicable to such a

[3] The argument relates only to petitioner's convictions on the substantive counts. The district court, in finding petitioner guilty of the conspiracy, "excluded from [its] consideration with respect thereto the questionable evidence" (App., *infra*, p. 6a).

search,[4] petitioner nevertheless lacks standing to challenge them.

As the court of appeals stated, "there was no showing whatever that [petitioner] had a reasonable expectation of privacy with respect to the Byrd vehicle" (Pet. App. A3). Although petitioner claims that he was the lessee of the vehicle and therefore had a substantial possessory interest in it, the district court found that Byrd, not petitioner, was the actual lessee and that petitioner merely guaranteed petitioner's credit (App., *infra*, p. 7a). Moreover, petitioner never had possession of the vehicle and was not present at the time it was stopped and searched. Consequently, as the district court correctly concluded (*ibid.*), he would not have standing even if he were, technically speaking, the vehicle's lessee. As the absentee renter of an automobile to be used for illegal purposes, petitioner did not, in the circumstances of this case, acquire a legitimate expectation of privacy with respect to the vehicle sufficient to invoke the protections of the Fourth Amendment.

Petitioner also appears to claim (Pet. 12) that he has standing to object to the seizure of the marihuana

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[4] The Fifth Circuit's decision on rehearing in *Byrd* (Pet. App. A18), in which the panel held the stop and search invalid under pre-*Almeida-Sanchez* standards, is in conflict with the same court's decision in *United States* v. *Miller*, 492 F. 2d 37, where the panel reached a contrary result on similar facts. Subsequent to the *Byrd* panel's decision on rehearing, the Fifth Circuit entered a unanimous *en banc* order in *Miller* endorsing the panel's opinion in that case (499 F. 2d 1247). *Byrd* remains pending on the government's petition for rehearing *en banc*.

because he was charged with its possession. Petitioner was charged and convicted as an aider and abettor of Byrd's unlawful possession, however, and that charge does not presuppose a possessory interest by petitioner in the contraband of the sort that the Fourth Amendment was designed to protect. Proof of petitioner's possession of the marihuana was not an essential element of the offense. Moreover, an interest in the marihuana would at most give petitioner standing to challenge the reasonableness of its seizure, not the reasonableness of the search leading up to its seizure. If, as we have shown, petitioner had no substantial interest in the vehicle, his rights could not be invaded by a search of the vehicle. Once the search revealed the marihuana, it was reasonable for the officers to seize it as contraband without a warrant. Thus, even if petitioner were considered to have standing to object to the seizure itself, his objection would lack merit.

Nor is petitioner's position advanced by the general argument (Pet. 12-14) that "but for" the allegedly illegal arrest of Byrd, the government would never have learned of petitioner's involvement in the marihuana transactions or of the identity of Webb and Price, who testified at petitioner's trial, and therefore that every development following Byrd's arrest was "tainted." This argument wholly fails to overcome the consequences of petitioner's lack of standing. Moreover, the evidentiary exclusionary rule designed to enforce the Fourth Amendment has never been construed to confer so broad an immunity

from investigation and prosecution. As this Court stated in *Nardone* v. *United States*, 308 U.S. 338, 341:

> Sophisticated argument may prove a causal connection between information obtained through [illegal means] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

2. Although no statement by Byrd implicating petitioner in the offenses charged was introduced at trial, and Byrd's testimony at trial did not incriminate petitioner (Tr. 104-128), petitioner contends (Pet. 14-20) that statements made by Byrd to government officials led to petitioner's indictment and eventual conviction and were the product of governmental coercion and duress that tainted the evidence offered at trial. The short answer to this claim is that only the alleged victim of the unlawful conduct, here Byrd, would have standing to complain of it. Cf. *United States* v. *Calandra*, 414 U.S. 338, 347-348. In any event, a detailed review of the circumstances culminating in Byrd's statement to customs officials shows that no wrong was committed.

Following Byrd's conviction on September 28, 1972, the district judge (the same judge who presided in the instant case) routinely requested a presentence investigation, which was conducted by Dan Beto, a probation officer of the district court (App., *infra*, pp. 3a-4a). Richard Byrd testified that he had two meetings with Beto during the presentencing proce-

dures. Byrd declined on the first visit to make any statement concerning his involvement in the offense charged (Tr. 126). Byrd conferred with his counsel, who advised him to "cooperate as much as possible," and on the second visit by Beto, approximately two weeks later, Byrd gave an extensive statement to Beto concerning his involvement in marihuana transactions (Tr. 124). The import of the statement, which was included in the presentence report, was described in the district court's memorandum (App., *infra*, p. 4a).

> Under the heading "Defendant's Version" (wherein a defendant is afforded an opportunity, if he elects, to state his version of the offense), Byrd gave a detailed statement concerning the organization for which he worked. This was to the effect that he, together with one Julian Price, was employed by James H. McConnell to run loads of marihuana from the Mexican border to Atlanta, Georgia, and other cities in the South. Byrd described the method of operation, the fee ($500 per trip), how the expenses were paid, and the number of trips which he and Price had made for McConnell. He stated that McConnell had given him the pistol which he was carrying at the time of his arrest. Byrd further stated to the probation officer that he (Byrd) did not know who was paying his attorneys' fee, but that he suspected that it was McConnell. This was the first time McConnell's name or his possible complicity had come to the Court's attention.

When the presentence report was presented to the court,[5] the judge noted that serious question arose out of the fact that Byrd was being represented by attorneys who were apparently being paid by his employer, petitioner, who was a possible unindicted co-conspirator. In the court's words (*id.* at 5a):

> It appeared then—as it appears at this moment —that there was a serious conflict of interest between the position of [petitioner] and that of Byrd. This would result from the fact that it was obviously to [petitioner's] interest for Byrd to remain uncooperative in all particulars, and to assume full responsibility for the offense; while it well might have been to Byrd's best interest to take a contrary course.

With that thought in mind, the judge directed Mr. Beto and Chief Probation Officer Miggins to speak with Byrd and explain to him what a conflict of interest was, that he was entitled to counsel devoted to serving his sole interest, that if he was unable to employ counsel the court would appoint one for him, and that Byrd should consider where his own best interest lay with regard to the future handling of the case. Byrd was so advised, and on January 8, 1973, he was sentenced (*ibid.*).

Byrd had no further contact with Beto until May 1973, some four months later. At that time, he con-

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[5] The Assistant United States Attorney who prosecuted petitioner's case stated that he had never seen this presentence report and never discussed Byrd's case with the probation officer (H. Tr. 34-35). ("H. Tr." refers to the transcript of the pre-trial hearing conducted on November 28, 1973.)

tacted Beto and stated that he wanted to make a statement to the Customs Service concerning his involvement in the matter (*id.* at 5a-6a). That statement led to petitioner's indictment and conviction.

The testimony of Beto concerning his conversations with Byrd (H. Tr. 13-26) and the testimony of the attorneys who were representing Byrd (H. Tr. 40-70) are in conflict as to the amount of "pressure" applied on Byrd to encourage him to make a statement to customs officials, which he eventually did some four months after he was sentenced. The testimony of Byrd himself, however, establishes that his eventual statement to customs officials was not the result of undue coercion. At trial, Byrd testified as follows in response to questions by petitioner's counsel (Tr. 112):

> Q: Now, you made a statement, a very complete statement, to these gentlemen, did you not?
>
> A: Yes, sir.
>
> Q: And in the back of your mind, why did you make that statement?
>
> A: Why, sir?
>
> Q: Yes, sir.
>
> A: Because I knew that I had broken the law, and I should be punished for this. But I just think that we should clear the record and tell who did what. I told them the whole truth, that is all.
>
> Q: This past week at 11:30, when you talked to me and I discussed with you that same ques-

tion, and I directed your attention to that same time and place, did you tell me the reason you did so, because in the back of your mind you thought you would get a lighter sentence?

A: I wanted to take the sentence that I deserved, sir.

Q: And did you not say that to me, "In the back of my mind, I thought I would get a lighter sentence."

A: In the back of my mind, I did, but that is not the reason I came.

There is no evidence of misconduct on the part of the judge or the probation officer that would warrant reversal of petitioner's conviction.[6]

3. Petitioner contends (Pet. 21), without substantial supporting argument, that the evidence is insufficient to sustain his conviction on the smuggling count (count 4). We note initially that petitioner received a joint sentence on counts 2 and 4. There is thus no need to consider his argument on this issue. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16; *Benton* v. *Maryland*, 395 U.S. 784. In any event, the argument is without merit.

The following findings by the district court are supported by uncontradicted evidence in the record (App., *infra*, pp. 11a-12a):

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[6] Nor, as petitioner contends, was the trial judge disqualified because he "became a witness in the case" (Pet. 20). At the pre-trial hearing, the judge did state his recollection of occurrences for the record (H. Tr. 11-15, 26-27), but this hardly made him a witness in the case.

> Throughout the conspiracy it appears that the drivers were in frequent telephonic communication with [petitioner] by which means they received their instructions on a day-to-day basis, and in some cases on an hour-to-hour basis. Additionally, the drivers had no personal contact with the suppliers of the marihuana. Invariably they were instructed by [petitioner] where to park their vehicles, and when to return to pick up such vehicles. At that time the vehicles would be loaded with marihuana; and they would again contact [petitioner] to receive instructions as to the destination of the load.
>
> In the instant case, when the drivers, in Laredo, phoned [petitioner] for instructions as to loading, they were advised by him "the river was too high for the load to be crossed" by reason of which fact they were to take off for two days and to return to Laredo for further instructions. The drivers drove to McAllen, Texas, and returned to Laredo as they had been told. They received further instructions as to where and when the vehicles were to be parked for the loading to take place. When they followed the instructions, they found the cars loaded.

The evidence supports the court's conclusion that petitioner was guilty as a principal of illegally importing marihuana, because he procured the commission of the offense (18 U.S.C. 2(a)) or willfully caused others to import the marihuana illegally (18 U.S.C. 2(b)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1975.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MEMORANDUM AND ORDER:

This defendant, James H. McConnell, tried alone, is charged in three counts of a four count indictment with (1) conspiracy to possess some 300 pounds of marihuana, with intent to distribute it; (2) as an aider and abetter in the possession with intent to distribute the same load of marihuana; and (3) with the smuggling of same into the United States. Two of the three co-defendants have entered pleas of guilty, and the third convicted in a separate trial.

McConnell's guilt is not in controversy. The evidence shows without dispute that he was a wholesale distributor of marihuana, who recruited and employed a number of young men to transport the marihuana from the Mexican border to cities throughout the South. Usually rented vehicles were employed. Each load was of some 200 to 300 pounds. Many of such loads resulted from McConnell's efforts.

The defense rests upon two questions of law, namely, whether this defendant has standing to question the validity of the search of one such vehicle, of which McConnell claims to have been the lessee; and his further contention that statements later made by the driver—which led to McConnell's indictment and trial—were not voluntarily given, or were the result of undue pressure or duress. By reason of this, Mc-

Connell urges that the law enforcement officers should never have learned of his identity or complicity at all.

It should be borne in mind, as noted in the chronological statement of the facts which follows, that most of these events occurred in those simple and uncomplicated days preceding the opinion of the Supreme Court in *Almeida-Sanchez* v. *United States*, —— U.S. ——, 93 S.Ct. 2535, 37 L.Ed.2d 596, June 21, 1973. Hence the matter should be viewed in that context.

In the early morning hours of May 9, 1972, one Richard G. Byrd was stopped by Border Patrol officers for an immigration check approximately 40 miles east of the City of Laredo, Texas, and on one of the two principal highways leading away from that city and the Mexican border. (See *United States* v. *Byrd*, 483 F.2d 1196 (5th Cir. 1973), reversing the conviction on the basis of *Almeida-Sanchez, supra.*) In the course thereof, one of the officers smelled marihuana, and required that Byrd open the trunk of his car. Some 300 pounds were found therein. Byrd was promptly arrested. A pistol was found on the floor of the car. The glove compartment of his car produced a car rental receipt showing the vehicle to have been rented by the Hertz Corporation in Houston, Texas. This document is of considerable importance, as will be noted hereafter. In the blank "to be paid by," the name "James H. McConnelly" was inserted. Byrd signed in the space provided for the lessee of the vehicle. Other blanks gave his

(Byrd's) driver's license and address. The car had been delivered to Byrd in Houston, Texas, April 19, 1972.

In Byrd's possession also was a Texaco credit card in the name of James H. McConnell.

Charges were promptly filed before the United States Magistrate against Byrd, and against McConnell. Byrd was completely uncooperative with the officers, and made no statement as to his guilt or innocence, or as to his associates. Charges against Byrd were presented to the grand jury, but the United States Attorney did not present charges, nor request an indictment, against McConnell because of the insufficiency of the evidence. The charges against McConnell were dismissed.

Following indictment, Byrd was arraigned. He was represented by the firm of attorneys of Heagy & Caswell, of Odessa, Texas. These attorneys did not reside in the Southern District of Texas and had not been admitted or previously appeared in this Court.

On September 28, 1972, the charges against Byrd went to trial. The evidence simply showed his possession of the quantity of marihuana, under the circumstances mentioned above. Byrd did not testify or offer any evidence in his own behalf. He was convicted of possession of the marihuana with the intent to distribute it, and of carrying a firearm while in the commission of this felony. He was acquitted on a third count (of smuggling the marihuana into the United States). The Court routinely requested a

presentence investigation and set the date for sentencing some six weeks thereafter.

The presentence investigation was prepared by Mr. Dan Beto, one of the probation officers of this Court, and was handed to the Court November 3, 1972.

The first unusual development in the Byrd case was the disclosure made in the presentence investigation. Under the heading "Defendant's Version" (wherein a defendant is afforded an opportunity, if he elects, to state his version of the offense), Byrd gave a detailed statement concerning the organization for which he worked. This was to the effect that he, together with one Julian Price, was employed by James H. McConnell to run loads of marihuana from the Mexican border to Atlanta, Georgia, and other cities in the South. Byrd described the method of operation, the fee ($500 per trip), how the expenses were paid, and the number of trips which he and Price had made for McConnell. He stated that McConnell had given him the pistol which he was carrying at the time of his arrest. Byrd further stated to the probation officer that he (Byrd) did not know who was paying his attorneys' fee, but that he suspected that it was McConnell. This was the first time McConnell's name or his possible complicity had come to the Court's attention.

This knowledge that the defendant Byrd was represented by attorneys previously unknown to the Court, and who apparently were paid by this defendant's employer, raised a serious question in the Court's mind as to the propriety of such representa-

tion. It appeared then—as it appears at this moment —that there was a serious conflict of interest between the position of McConnell and that of Byrd. This would result from the fact that it was obviously to McConnell's interest for Byrd to remain uncooperative in all particulars, and to assume full responsibility for the offense; while it well might have been to Byrd's best interest to take a contrary course. The Court noted that he had elected to remain completely silent during the trial; but that a month later, in discussing the matter with a probation officer in Houston, and in the absence of his attorneys, had elected to divulge this information. With this thought in mind, the Court called Mr. Beto and the Chief Probation Officer of the District (Mr. Miggins) and instructed them that they should speak again with Byrd; they were instructed to explain to him what a conflict of interest was; to advise him that he was entitled to counsel devoted only to his own best interests, without regard to the interest of any other potential defendant; that if he was unable to employ counsel on his own behalf, as an indigent the Court would appoint counsel to represent him; and to advise him that he should consider wherein his own best interests lay with regard to the future handling of his case. These probation officers reported to the Court in January, 1973, that Byrd had been so advised, and stated that he would consider the matter. Byrd was sentenced January 8, 1973.

The Probation Service heard nothing further from Byrd until May, 1973, some four months later. At

that time he contacted Mr. Beto by phone and stated that he had considered the matter, and decided that he wanted to cooperate and to make a statement about the entire matter to the Customs Service. At his request an appointment was arranged, and Byrd proceeded from his home in Louisiana, alone, to Laredo, Texas, where he gave an extended statement implicating McConnell, Price, and two other drivers, namely, Webb and Connerly. He appeared before a grand jury, and his testimony led to the present indictment of these parties.

With respect to the charge of conspiracy (Count 1), the question of McConnell's standing to question the arrest and search of Byrd is immaterial. The testimony of Price and Webb was clear, convincing, and undisputed regarding the agreement among the conspirators to possess large quantities of marihuana for the purpose of distribution. A number of overt acts are shown to have been committed within this District, all prior to Byrd's arrest. Hence the offense is made out without regard to the evidence surrounding the Byrd search. [*Brown* v. *United States*, 411 U.S. 222, Note 4, p. 230, 1973; *Sandejas* v. *United States*, 428 F.2d 1040 (9th Cir. 1970).] I find the defendant guilty on Count 1 of the indictment, and have excluded from my consideration with respect thereto the questionable evidence.

With respect to Count 2 (charging this defendant as an aider and abetter in Byrd's possession of the 300 pounds), the question of his standing is material. As stated, McConnell contends that he was the lessee

of the vehicle and, although not present and never having had the vehicle in his possession, that he nevertheless has standing to question the search.

The evidence on this point is to the following effect. At the time that Byrd was to make the trip in question, he was in Houston, Texas, while McConnell was in Jackson, Mississippi. Byrd did not have the necessary funds or credit to lease the car. Recognizing this situation, McConnell and Byrd had arranged that at a designated time, McConnell would present himself at the Hertz office in Jackson, Mississippi, where he would guarantee that the rental on Byrd's vehicle (to be delivered to Byrd in Houston) would be paid, by use of McConnell's credit card. The Hertz representative in Houston spoke to the Hertz representative in Jackson, by telephone; the arrangement was confirmed; and the Houston agent delivered the vehicle to Byrd.

Under these circumstances, I construe Byrd to have been the lessee of the vehicle, with his credit guaranteed by McConnell. The rental agreement (Exhibit 2) so indicates and I would construe the oral testimony to the same effect. Even if McConnell be considered the lessee, in a technical sense, without ever having had possession of the car and not being present at the time of the arrest, I would have serious doubt as to his standing, for the search was not directed at him.

In dealing with this question the Supreme Court has stated in *Jones* v. *United States*, 362 U.S. 257, at 261:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . .

"Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

Additionally, in a more recent case clearly in point, through Mr. Justice White the Court stated (*Alderman* v. *United States*, 394 U.S. 165 (1969):

"We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons* v. *United States*, 390 U.S. 377 (1968); *Jones* v. *United States*, 362 U.S. 257 (1960). Cf. *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943). None of the special circumstances which prompted *NAACP* v. *Alabama*, 357 U.S. 499 (1958), and *Barrows* v. *Jackson*, 346 U.S. 249 (1953), are present here. There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object

for himself when and if it becomes important for him to do so.

"What petitioners appear to assert is an independent constitutional right of their own to exclude relevent and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion."

Also, see *Brown* v. *United States*, 411 U.S. 223 (1973).

In this connection it should be noted further that the only *property* of McConnell discovered in the Byrd search was his Texaco credit card. *This was not offered by the Government, but was offered by the defendant.*

Nor do I consider that the defendant McConnell may escape by the argument that Byrd's unlawful arrest set in motion the whole chain of circumstances; and that every development that followed was contaminated. McConnell was convicted on the testimony of Price and Webb; the Government learned of Price and Webb from Byrd's statement in May, 1973, a year following his arrest and four months following his sentence. The exclusionary rule has never gone so far. "Sophisticated argument may prove a causal connection between information obtained through illicit [means] and the Government's proof [obtained

from independent sources]. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). And see, *Gissendanner* v. *Wainwright*, 482 F.2d 1293 (5th Cir. 1973).

Additionally, it should be borne in mind that Byrd's arrest and all that ensued was not illegal *at the time that it occurred.* The arrest became illegal only by reason of *Almeida-Sanchez.* Similar arrests and convictions had been repeatedly upheld in prior cases, e.g., *United States* v. *Wright*, 476 F.2d 1027 (5th Cir. 1973); *United States* v. *McDaniel*, 463 F. 2d 129 (5th Cir. 1972); *United States* v. *Maggard*, 451 F.2d 502 (5th Cir. 1971); *United States* v. *Bird*, 456 F.2d 1023 (5th Cir. 1972); *United States* v. *Thompson*, 475 F.2d 1359 (5th Cir. 1973).

Defense counsel likewise urges that the contact between the probation officer and Byrd was such as improperly to influence him to talk, or to lose confidence in his counsel, all of which resulted in his change of heart as result of which he elected to testify. Such a chain of causes is too devious and attenuated to find support in any authority with which I am familiar. There was no impropriety or overreaching in the Probation Service of this Court having explained to Byrd the dangers inherent in his position when his counsel was employed and paid by a potential co-defendant whose interests were adverse; and it was more than four months following the sentencing and

the last contact between Byrd and the Probation Service before he advised of his change of heart, and gave the incriminating testimony before the grand jury.

Byrd did not testify as a Government witness at the trial. He was called by the defendant, and testified only as to his conversations with the probation officer involved.

Thus, considering the evidence developed following Byrd's arrest (the rental agreement, and the 300 pounds of marihuana in Byrd's possession), I find the defendant guilty on Count 2 of the indictment.

With respect to Count 4 (smuggling the 300 pounds here at issue), the evidence is all circumstantial. However, it is convincing and in my judgment adequate beyond a reasonable doubt to support a conviction.

Throughout the conspiracy it appears that the drivers were in frequent telephonic communication with McConnell by which means they received their instructions on a day-to-day basis, and in some cases on an hour-to-hour basis. Additionally, the drivers had no personal contact with the suppliers of the marihuana. Invariably they were instructed by McConnell where to park their vehicles, and when to return to pick up such vehicles. At that time the vehicles would be loaded with marihuana; and they would again contact McConnell to receive instructions as to the destination of the load.

In the instant case, when the drivers, in Laredo, phoned McConnell for instructions as to loading, they

were advised by him "the river was too high for the load to be crossed" by reason of which fact they were to take off for two days and to return to Laredo for further instructions. The drivers drove to McAllen, Texas, and returned to Laredo as they had been told. They received further instructions as to where and when the vehicles were to be parked for the loading to take place. When they followed the instructions, they found the cars loaded.

Thus it appears clear that under § 2 of Title 18 U.S.C.A. McConnell was a principal in the smuggling operation in that [under subparagraph (a)] he "procured" the commission of the offense or [under subparagraph (b)] that he willfully caused the smuggling to be done. Thus I find the defendant guilty on Count 4.

The Probation Service will prepare a presentence investigation. The defendant McConnell will present himself for imposition of sentence on notice. Clerk will furnish counsel copy of this Memorandum.

Done at Houston, Texas, this 24th day of January, 1974.

/s/ Ben C. Conally
United States District Judge

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